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No. 94-7254

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

TERRY DWIGHT BARBER,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Petition for the Writ of Certiorari
to the
Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES W. BURSON
Attorney General & Reporter

GORDON W. SMITH
Associate Solicitor General

AMY L. TARKINGTON
Assistant Attorney General
Counsel of Record

450 James Robertson Parkway
Nashville, Tennessee 37243-0493
(615) 741-2216

Counsel for Respondent

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QUESTIONS PRESENTED

1. Did the Supreme Court of Tennessee conduct an appropriate harmless error analysis in this case following the standard set forth by this Court in Stringer v. Black, 503 U.S. ____, 112 S.Ct. 1130 (1992)?

2. Has the petitioner's second issue been raised by the decision below; in any event, is the attack upon the constitutionality of the "heinous, atrocious or cruel" aggravating factor without merit?

OPINION BELOW

The opinion of the Supreme Court of Tennessee has been marked for publication, but has not yet been published. A copy of the opinion is annexed as Appendix "C" to the petition.

JURISDICTION

The opinion of the Supreme Court of Tennessee was filed on October 3, 1994. On November 28, 1994, the Supreme Court of Tennessee entered an order denying the petition to rehear. Each of these orders is attached to the petition. The petitioner now seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257.

STATEMENT

Following a jury trial in the Circuit Court of Lake County, the petitioner was convicted of first-degree felony murder in perpetration of a larceny, first-degree burglary, and armed robbery. He was sentenced to death by the jury on the felony murder conviction. The jury found two aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. §39-2-203(i)(5); and (2) the murder was committed during the commission of a larceny, Tenn. Code Ann. §39-2-203(i)(7). The trial court fixed separate sentences of fifteen (15) years and life imprisonment on the burglary and armed robbery convictions, respectively.

The proof at trial showed that the petitioner and his brother burglarized the home of Lora Smith, a 75-year-old woman in bad health and who used a walker, beat her to death with a crescent wrench, and stole a pistol, a ring, some jewelry, and a couple of jewelry boxes.

The petitioner wore a ski mask, but the victim recognized his brother. As a result, the petitioner killed Mrs. Smith. The victim's skull was virtually crushed; there were at least five blows and possibly more. Medical evidence demonstrated that the victim was alive when all blows were struck. After the murder, the petitioner told

his mother that "he had to do it because she recognized him." He later told a fellow jail inmate that he "had to hit the old bitch four or five times to ever get her down." (A detailed summary of the evidence is contained in the opinion of the Tennessee Supreme Court on direct appeal, State v. Barber, 753 S.W.2d 659, 660-63).

On direct appeal, the Supreme Court of Tennessee affirmed the conviction and sentence. Id. This Court denied certiorari. Barber v. Tennessee, 488 U.S. 900 (1988).

The petitioner subsequently filed in the trial court a pro se petition for post-conviction relief under Tenn. Code Ann. §40-30-101, et seq., raising various constitutional claims. After an evidentiary hearing, the trial court denied relief, and the Court of Criminal Appeals affirmed. The petitioner applied to the Supreme Court of Tennessee for review. While the application was pending, State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), was released. In that case, the Court held that the felony murder aggravator, §39-2-203(i)(7), is unconstitutionally applied where the death penalty is imposed for felony murder. The Court granted review, applied Middlebrooks retroactively, but affirmed the judgment, finding invalidation of the felony murder aggravator to be harmless beyond a reasonable doubt.

ARGUMENT

First, the petitioner contends, in several sub-arguments, that the Supreme Court of Tennessee utilized an improper standard in determining whether submission of an invalid aggravating circumstance to the jury in his case constituted harmless error. Second, he contends that Tenn. Code Ann. §39-2-203(i)(5), the "heinous, atrocious or cruel" aggravating factor is unconstitutionally vague. The respondent submits that the Supreme Court of Tennessee conducted an appropriate harmless error analysis in accord with Stringer v. Black, 503 U.S. ____, 112 S.Ct. 1130 (1992). The respondent further submits that the petitioner's vagueness challenge to §39-2-203(i)(5) was not pressed or passed on below, but, in any event, the statute is constitutional.

1. It is well-established law that in a weighing state like Tennessee, when a reviewing court strikes one or more of the aggravating circumstances upon which the sentencer relied in imposing the death penalty, the reviewing court may, consistent with the United States Constitution, either reweigh the remaining evidence or conduct a harmless error analysis. As this Court held in Sochor v. Florida, 504 U.S. ____, 112 S.Ct. 2114, 2119 (1992):

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an 'invalid' aggravating circumstance in reaching the ultimate decision to impose a death sentence. See Clemons v. Mississippi, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness,' Stringer v. Black, 503 U.S. ___, ___, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a 'thumb [on] death's side of the scale,' id., at ____, 112 S.Ct., at 1137, thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty,' id., at ___, 112 S.Ct. at 1139. Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of 'the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.' Clemons, supra, 494 U.S., at 752, 110 S.Ct., at 1450 (citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); see Parker v. Dugger, 498 U.S. ___, ___, 111 S.Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id., at ___, 111 S.Ct., at 738.

The Supreme Court of Tennessee has chosen to conduct a harmless error analysis. In State v. Howell, 868 S.W.2d 238 (Tenn. 1993), the Supreme Court of Tennessee

chose to adopt a harmless error analysis in cases where a constitutionally invalid aggravating circumstance had been submitted to the jury in a capital sentencing proceeding. Howell, supra, at 259-60. As was noted in the opinion in the petitioner's case, in Howell, supra, at 259-60, the Supreme Court of Tennessee followed the harmless error standard set out by this Court in Stringer v. Black, supra. Under the rule adopted in Howell, therefore, before a capital sentencing jury's consideration of an invalid aggravating factor may be declared harmless error, an appellate court must conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the aggravating factor. Howell, supra, at 260. The Supreme Court of Tennessee has thus adopted a harmless error analysis that clearly meets the constitutional standards as explained by previous opinions of this Court.

Having adopted the Stringer standard, the Supreme Court of Tennessee in Howell then articulated four factors to be examined when undertaking a harmless error analysis. It is clear that the Supreme Court of Tennessee in the petitioner's case conducted a thorough analysis under the factors as set forth in Howell and concluded beyond a reasonable doubt under the Howell standard that the sentence would have been the same had the jury given no weight to the

invalid felony murder aggravating factor. The opinion of the Supreme Court of Tennessee in this case thus provides no basis for the granting of a petition for writ of certiorari.

2. In his second issue, the petitioner contends that Tenn. Code Ann. §39-2-203(i)(5), the "heinous, atrocious or cruel" aggravating factor as used in his case is unconstitutionally vague. However, the substance of this issue was not presented in the petition for post-conviction relief and thus was not addressed in the opinion of the Supreme Court of Tennessee. Since the issue was not pressed or passed on below, this Court should not grant review. Illinois v. Gates, 462 U.S. 213, 217-24 (1983).

In any event, the petitioner's claim is without merit. At the time of the petitioner's offense, Tenn. Code Ann. §39-2-203(i)(5) provided as an aggravating factor:

> The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

In response to constitutional concerns with this statutory aggravating factor, in State v. Williams, 690 S.W.2d 517, 525-533 (Tenn. 1985), the Tennessee Supreme Court thoroughly explained the application of the heinous, atrocious, or cruel aggravator and held that capital

sentencing juries must be fully instructed on this aggravating factor so as to tighten its definition and allow its application only in appropriate circumstances. Thus, on direct appeal of the petitioner's case, the Tennessee Supreme Court, following the standards set forth in Williams, supra, found that the heinous, atrocious, or cruel aggravating circumstance was properly applied to the petitioner's case where the evidence in the guilt phase showed that the cause of the 70 year old victim's death was multiple blows to the head and ensuing brain damage. State v. Barber, 753 S.W.2d 659, 668-669 (Tenn. 1988), cert. denied 488 U.S. 900 (1988). The proof further showed that the victim was alive when all of the blows were struck because an inflammatory reaction was present in each of the wounds. Id. Given this proof, and the limiting definitions applied to the heinous, atrocious or cruel aggravating circumstance as prescribed by the Supreme Court in Williams, supra, it is clear that there was no constitutional vagueness problem in the petitioner's case with the application of this statutory aggravating factor.

In Proffitt v. Florida, 428 U.S. 242, 255-56 (1976), this Court rejected Proffitt's vagueness attack on an identical aggravating circumstance in Florida's death penalty statute. Furthermore, this Court has repeatedly denied review in Tennessee cases where such vagueness

challenges have been raised. See, e.g., State v. Dicks, 615 S.W.2d 126 (Tenn. 1981), cert. denied, 454 U.S. 933 (1981); State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981), cert. denied, 454 U.S. 882 (1981); State v. Strouth, 620 S.W.2d 467 (Tenn. 1981), cert. denied, 455 U.S. 983 (1981). This issue provides no basis for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter

GORDON W. SMITH
Associate Solicitor General

AMY L. TARKINGTON
Assistant Attorney General
Counsel of Record

450 James Robertson Parkway
Nashville, Tennessee 37243-0493
(615) 741-2216

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 1995, one copy of the Respondent's Brief in Opposition was mailed via United States Mail, postage prepaid, to Christopher M. Minton & Paul R. Bottei, CCRC, 704-18th Avenue, S., Nashville, TN 37203, Counsel for Petitioner. I further certify that all parties required to be served have been served.

Amy L. Tarkington

AMY L. TARKINGTON
Assistant Attorney General